87-469

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REYNOLDS METALS COMPANY,
ASSOCIATED INDUSTRIES OF ARKANSAS,
RICELAND FOODS, INC., and WEYERHAEUSER COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the restrictions in Section 201 of the Federal Power Act denying the Federal Energy Regulatory Commission ("FERC") jurisdiction over "generation facilities" and "purchases" of wholesale power, which were intended to preserve State regulatory authority over these matters, preclude FERC from acting under Section 206 of the Act to reallocate the costs of expensive nuclear plants by forcing a utility in one State to purchase the generation capacity of such plants built by affiliates in other States when that utility and its affiliates have been part of an integrated system serving several States.

RULE 28.1 STATEMENT

Reynolds Metals Company is the parent of the Eskimo Pie Corp., whose shares are publicly traded. Associated Industries of Arkansas is a trade association whose members need not be listed here. Riceland Foods, Inc. is a group of cooperative enterprises owned and controlled by some 15,000 farmer members located primarily in Arkansas. To the knowledge of counsel, none of the affiliates or subsidiaries of Weyerhaeuser Company has any outstanding securities in the hands of the public.

PARTIES TO THE PROCEEDING

The petitioners herein (Reynolds Metals Company, Associated Industries of Arkansas, Riceland Foods, Inc., and Weyerhaeuser Company) were petitioners in one of the appeals consolidated by the court of appeals.

The respondent in the court of appeals was the Federal Energy Regulatory Commission, which was supported by petitioner-intervenors Louisiana Public Service Commission; Jefferson Parish, Louisiana; City of New Orleans, Louisiana; Occidental Chemical Corporation; Georgia Gulf Corporation; and by intervenors Union Carbide Corporation; Louisiana Power & Light Company; New Orleans Public Service, Inc.; Middle South Energy, Inc.; and Middle South Services, Inc.

Other petitioner-intervenors in the court of appeals were Arkansas Power & Light Company; Arkansas and Missouri Congressional Delegations; Arkansas Public Service Commission; State of Arkansas; Cities of Conway and West Memphis, Arkansas; AMAX, Inc.; Missouri Public Service Commission; Mississippi Public Service Commission; Mississippi Power & Light Company; Representative Webb Franklin; Edwin Lloyd Pittman, Attorney General of the State of Mississippi; Mississippi Legal Services Coalition; Representative Wayne Dowdy; and Mississippi Industries (comprised of Anderson-Tully Co.; Columbus Lumber Co.; Crouse-Hinds Lighting; Great Southern Wirebound Box Co.; Madison Furniture Industries; Chloride, Inc., Automotive Div.; Greenville Mill; Marathon LeTourneau Co.; Perma "R" Products, Inc.; and Cives Steel Co.).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 808 F.2d 1525 (App. 1a).[1] The separate opinion of Judge Bork, concurring in part and dissenting in part, is reported at 808 F.2d 1568-69 (App. 94a-96a). On June 24, 1987, the original panel vacated a portion of its earlier decision in an order reported at 822 F.2d 1103 (Supp. App. 14a).

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[1] Appendix references are to the Appendix accompanying the petition for a writ of certiorari in *Arkansas Public Service Comm'n* v. *Federal Energy Regulatory Comm'n*, No. 86-1380 (filed Feb. 20, 1987). Additional references (Supp. App.) are to the attached Supplemental Appendix.

The opinions of the Federal Energy Regulatory Commission (""FERC") and its administrative law judges are listed in the margin.[2]

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1987 (Supp. App. 1a). On April 3, 1987, the full court of appeals granted rehearing *en banc;* on June 24, 1987, the full court vacated its grant of rehearing *en banc* (Supp. App. 12a) and the panel granted rehearing (Supp. App. 14a). By its order of June 24, 1987, the panel vacated the portions of its opinion of January 6, 1987, from which Judge Bork had dissented, reversed in part FERC's prior decisions, and remanded the case to FERC for reconsideration and explanation of certain issues (*id.*).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, is reprinted in full at App. 527a-554a.

Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of

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[2] *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC (CCH) ¶ 61,305 (1985) (App. 141a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 FERC (CCH) ¶ 61,425 (1985) (opinion on rehearing) (App. 97a); *Middle South Services, Inc.*, 30 FERC (CCH) ¶ 63,030 (1985) (ALJ initial decision) (App. 223a); *Middle South Energy, Inc.*, 26 FERC (CCH) ¶ 63,044 (1984) (ALJ initial decision) (App. 374a).

> electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydro-electric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

STATEMENT OF THE CASE

The court of appeals held that FERC had jurisdiction under the Federal Power Act to order an Arkansas electric utility—Arkansas Power & Light Company ("AP&L")—to pay for a substantial percentage of the capacity in the grossly uneconomical Grand Gulf No. 1 nuclear plant ("Grand Gulf") built in Mississippi, at a cost of $3 billion, by a separate company owned by the holding-company parent of AP&L. AP&L does not need or want that capacity, and the Arkansas Public Service Commis-

sion ("Arkansas PSC") is opposed to FERC's order requiring AP&L to pay for Grand Gulf capacity when AP&L has not agreed to do so and when the Arkansas PSC has never reviewed any request by AP&L to purchase such capacity.[3]

The MSU System. The Grand Gulf nuclear plant is located in Port Gibson, Mississippi, and is owned by Middle South Energy, Inc. ("MSE"). MSE is a subsidiary of Middle South Utilities, Inc. ("MSU"), which is a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.*

MSU owns four electric utility operating companies serving four south-central states. These companies are AP&L (serving Arkansas and part of Missouri), Louisiana Power & Light Co. ("LP&L"), New Orleans Public Service, Inc. ("NOPSI") and Mississippi Power & Light Co. ("MP&L"). Each operating company is separately incorporated, has its own board of directors and management, serves a separate geographic area, and has separate generation facilities.

Like many other utilities throughout the nation, the MSU operating companies participate in a power-sharing pool, and seek to coordinate the expansion of their individual generation facilities in order to achieve the greatest economies of scale. The four MSU operating companies sell and exchange capacity and energy among themselves. These transactions have for many years been controlled by some form of "system agreement." Although the system agreements have provided for coor-

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[3] The Arkansas PSC and AP&L have already filed petitions for certiorari seeking review of the court of appeals' decision. *Arkansas Public Service Comm'n* v. *FERC*, No. 86-1380 (filed Feb. 20, 1987); *Arkansas Power & Light Co.* v. *FERC*, No. 86-1424 (filed Mar. 4, 1987). The Missouri Public Service Commission joined in the Arkansas PSC's petition and opposes FERC's decision.

dinated planning of new generation facilities, they have also provided that each operating company is responsible for owning or purchasing generating capacity necessary to meet the requirements of its own customers (App. 182a).

State Regulation. While the four MSU operating companies engage in significant inter-affiliate transactions, each operating company is subject to regulation of its retail rates, generation facilities, and wholesale power purchases by the state regulatory bodies with jurisdiction over its service area. AP&L is no exception, and prior to this case had been subject to rigorous regulation of these matters by the Arkansas PSC.[4]

In exercising its regulatory powers over AP&L, the Arkansas PSC had succeeded in its duty of assuring that Arkansas ratepayers would be provided with both economical and adequate supplies of electric energy. For example, in 1974 and 1980 respectively, AP&L brought on line nuclear facilities—Arkansas Nuclear One 1 ("ANO-1") and Arkansas Nuclear One 2 ("ANO-2")—at an overall cost of approximately $500 per kilowatt, and those plants are able to produce economical power (App.

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[4] The Arkansas PSC may disallow any retail rates for the sale of electric power subject to its jurisdiction that it finds to be unreasonable, Ark. Stat. Ann. § 73-204(a), and has broad powers to review actions by utilities that have or may affect retail rates for electric power. In particular, public utilities in Arkansas —including AP&L —are required to apply to the Arkansas PSC for approval of the construction of generation facilities, Ark. Stat. Ann. §§ 73-276.1 *et seq.*, and for the purchase, sale, lease or rent of any utility property constituting an operating system or unit. Ark. Stat. Ann. § 73-253(a)(3).

Similar regulatory requirements exist under Missouri law, *see* Mo. Rev. Stat. §§ 393.170, 393.190, 393.200, and are implemented by the Missouri Public Service Commission with respect to AP&L's operations in Missouri.

14a). The construction of these and other plants—which were built by AP&L only after the Arkansas PSC had certificated the need for such plants—has provided AP&L with more than sufficient base load capacity to meet the demand of its customers for the foreseeable future.

Grand Gulf Cost Overruns. Like many other nuclear plants built in recent years, huge cost overruns were incurred in constructing Grand Gulf. When construction began in 1974, the projected cost of Grand Gulf was $1.2 billion for two 1250 megawatt generating units (or about $500 per kilowatt) (App. 14a). This projection proved to be terribly mistaken. By the time Grand Gulf came on line in July 1985, delays due to a variety of factors, coupled with inflation, had driven Grand Gulf's costs to more than $3 billion for only *one* of the two planned units (App. 14a).[5] As a consequence, Grand Gulf is among the most expensive power sources on the MSU system. The Arkansas PSC, of course, never approved the construction of Grand Gulf.

The MSU Agreements. In 1982, several years before Grand Gulf came on line, two agreements were filed with FERC. The System Agreement specified the general terms and conditions under which the MSU operating companies would exchange capacity and energy. The Unit Power Sales Agreement ("UPSA"), which resulted from negotiations and agreements among the operating companies and MSE in the preceding years,[6] established the

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[5] Construction of the second unit, Grand Gulf No. 2, has been halted (App. 16a n.22).

[6] The precursors of UPSA were a July 1980 "Memorandum of Understanding" and a July 1981 "Reallocation Agreement," both of which freed AP&L of all responsibility for Grand Gulf (App. 18a). In November 1981, the Securities and Exchange Commission approved the Reallocation Agreement pursuant to Section 12(f) of the Public

companies' respective cost responsibility for the Grand Gulf plant. The UPSA, executed by all the MSU operating companies, allocated Grand Gulf's generation capacity and construction costs as follows:

Utility	Contractually Agreed Share of Grand Gulf Capacity
LP&L	38.57%
MP&L	31.63%
NOPSI	29.80%
AP&L	0%

The parties, including AP&L, thus agreed in UPSA (as they had agreed previously) that AP&L had no contractual responsibility to pay for *any* share of Grand Gulf's capacity and costs. AP&L was the first operating company to invest in nuclear power and by 1980 had brought on line two nuclear plants (AN0-1 and AN0-2). By the time negotiations had produced UPSA, AP&L was also building several new coal-fired power plants (also certificated by the Arkansas PSC on the basis of need in Arkansas) and thus had adequate base load capacity (App. 395a). AP&L therefore could not effectively use the additional power available from Grand Gulf, but the other MSU operating companies determined in UPSA to purchase Grand Gulf power because they believed at that time that it would provide an economic alternative to other modes of generation.

The FERC Proceedings. FERC recognized that its review of the two agreements presented "some extremely difficult and controversial cost allocation issues which have no easy answers" (App. 145a). After proceedings

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Utility Holding Company Act, 15 U.S.C. § 79*l*(f). *Middle South Energy, Inc.*, 23 SEC Dock. 1595, 1596 (Nov. 18, 1981) (Rel. No. 22280).

before two administrative law judges, FERC determined, over the strenuous objections of Arkansas, Missouri, and Mississippi governmental parties, that it had jurisdiction under the Federal Power Act to abrogate the agreements and "reallocate" Grand Gulf's capacity among the four MSU operating companies, and specifically to require AP&L to become a purchaser of that plant's capacity (App. 167a-69a, 216a).

FERC then proceeded to mandate revisions to UPSA that would reallocate Grand Gulf's capacity in a manner intended to spread among the four operating companies, in proportion to their individual share of the MSU system's total demand, the investment costs of *all* nuclear plants anywhere on the MSU system (App. 22a). These included ANO-1 and ANO-2, Grand Gulf, and a Louisiana plant then being completed by LP&L (Waterford 3). Because AP&L had built its two Arkansas nuclear plants relatively cheaply, FERC's reallocation shifted to AP&L the *largest* share of Grand Gulf capacity, as shown below:

Utility	Contractually Agreed Share of Grand Gulf Capacity and Energy	FERC "Reallocation" of Grand Gulf Capacity
LP&L	38.57%	14%
MP&L	31.63%	33%
NOPSI	29.80%	17%
AP&L	0%	36%

In determining that it had jurisdiction under the Federal Power Act to force AP&L to become a purchaser of Grand Gulf capacity, FERC relied on its general jurisdiction under Section 201(b)(1) to regulate the "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Although Section 201(b)(1) also states that FERC shall not have jurisdiction, except as specifi-

cally provided, "over facilities used for the generation of electric energy," FERC concluded that this limitation did not apply because electricity generated at the Grand Gulf plant was to be "used for interstate wholesale sales" (App. 106a). FERC emphasized the highly integrated nature of the MSU system, though it acknowledged that the system was not a "monolith" and that the individual operating companies had some autonomy in system decision-making (App. 119a).

FERC also rejected arguments that its order would unlawfully "force" AP&L to purchase Grand Gulf capacity. It concluded instead that FERC's remedial powers under Section 206 of the Federal Power Act authorized it to order AP&L to pay for a share of Grand Gulf because the contracts entered into by the MSU operating companies "affected" rates for the sale of wholesale power. In FERC's view, its actions were not to be characterized as requiring a "forced purchase," but rather as implementing an "appropriate allocation" of costs among the affiliated MSU operating companies (App. 111a, 169a).

The Court of Appeals Decision. The court of appeals affirmed FERC's jurisdictional decision (App. 32a-39a).[7] Because Grand Gulf and other generating facilities "had been built and planned on a profoundly integrated basis," the court held that FERC "properly may examine [generation capacity] allocation as a cost component affecting wholesale rates" (App. 33a). The court accordingly believed that MSU's historical coordination of the capacity additions of the individual operating companies gave FERC sweeping authority to shift generation costs among the companies.

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[7] The court of appeals' jurisdiction was based on 16 U.S.C. § 825*l*(b).

In its original decision, the court also affirmed FERC's specific "reallocation" of Grand Gulf costs among the MSU operating companies.[8] However, the court subsequently decided to remand the case to FERC for reconsideration of the "reallocation" that it chose and for an explanation of why FERC's decision was not itself "unduly discriminatory" insofar as the agency did not go further in equalizing nuclear capacity costs, or, alternatively, in equalizing the cost of all nuclear *and* coal units built by MSU entities (Supp. App. 14a-15a). FERC has not yet issued any decision upon reconsideration, but has invited comment on how it should proceed (Supp. App. 16a).

REASONS FOR GRANTING THE WRIT

This is a case of enormous importance. AP&L has been ordered to absorb a substantial portion of the $3 billion incurred in bringing Grand Gulf on line. There are five million consumers of electric power served by the MSU operating companies in the States of Arkansas, Louisiana, Mississippi and Missouri. Each will be significantly affected by the lower court's interpretation of the Federal Power Act. In Arkansas, the impact promises to be devastating. Households in Arkansas will experience skyrocketing electric bills and businesses critical to Arkansas' economy, especially those that are energy-

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[8] Judge Bork, dissenting from this part of the court's decision, argued that FERC had not adequately explained why its remedy permitted the continuation of large disparities in the MSU operating companies' nuclear capacity costs, with AP&L continuing to bear the lowest costs on an average per-kilowatt basis (App. 94a). The full court of appeals granted rehearing *en banc* to consider the issues raised in Judge Bork's dissent (Supp. App. 9a), but that rehearing order was later vacated when the original panel agreed to rehear those issues and adopted Judge Bork's reasoning (Supp. App. 12a).

intensive, will suffer enormously.[9] Future industrial development throughout the region will necessarily be substantially influenced by the allocation of Grand Gulf's extraordinary costs.

All of this has been required by FERC's misinterpretation of what was designed as a consumer protection statute, a fact scarcely mentioned in the opinion of the court of appeals upholding FERC's jurisdiction. Although Congress decided in the Federal Power Act that consumers would best be served by State regulation, supplemented only where necessary by federal agency control, the decision in this case sustains a broad and unprecedented view of federal authority. Regional regulation, which is what Congress rejected but the court of appeals sanctioned, necessarily means federal regulation; and federal regulation necessarily means that the States have no control.

FERC's "reallocation" order has already led to a great deal of litigation and controversy. *See* note 33, *infra*. Indeed, there is now before the Court an appeal from the decision of the Mississippi Supreme Court denying MP&L an increase in its retail rates until the prudency of Grand Gulf's costs is first determined by Mississippi state regulators. *Mississippi Power & Light Co.* v. *State of*

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[9] For example, petitioner Riceland Foods is a farmer-owned cooperative with approximately 15,000 members. It handles between 30 and 50 percent of Arkansas' soybean crop and 45 to 60 percent of the state's rice crop. As recognized in the FERC proceedings, farmers in Arkansas will be affected in two ways by FERC's reallocation of Grand Gulf costs: first, there will be higher irrigation, grain drying and storage costs on the farm itself, and second, there will be higher processing costs at Riceland Foods' plants. Riceland Foods' operations are energy-intensive, and cost increases resulting from higher electric-power rates will have to be absorbed by farmers since the added costs cannot be easily passed along in the price-competitive international market for farm goods (App. 331a).

Mississippi, No. 86-1970 (jurisd. statement filed June 8, 1987). The controversy in that case relates to the same FERC order directing AP&L to pay for Grand Gulf capacity, and it would be appropriate to consider the two cases together in light of their common factual basis and the related issues of federal and state jurisdiction.

The questions presented here are far-reaching and are bound to recur. Integration and coordination among utilities is commonplace.[10] By relying on the integrated nature of the four operating companies comprising Middle South Utilities, FERC and the court below have swept within their rulings the potential to "reallocate" more than half of the entire nation's generating capacity. The controversy centers on who should pay for costly nuclear plants in Mississippi and Louisiana, but this too is a circumstance that is far from unique to this case.[11]

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[10] There are nine registered public utility holding companies with electric utility subsidiaries, and those subsidiaries serve over 20 states. SEC Office of Public Utility Regulation, *Financial and Corporate Report Registered Public Utility Holding Company Systems* (March 31, 1986). Formal electric utility power-pooling arrangements are also prevalent throughout the country. When FERC last studied the subject, it identified formal pools of "12 corporately unaffiliated groups, representing 44 percent of the national generating capacity, plus the five holding company pools representing about 15 percent." FERC, *Power Pooling in the United States* 9 (1981).

[11] The extensive record of nuclear power plant cancellations and cost overruns was noted in the FERC proceedings (App. 256a), and the particular case of the costly Wolf Creek nuclear plant in Kansas has already come to the Court's attention in an appeal that was subsequently withdrawn. *Kansas Gas & Electric Co.* v. *State Corporation Comm'n*, 239 Kan. 483, 720 P.2d 1063 (1986), *appeal dismissed*, 56 U.S.L.W. 3017 (1987). One leading business journal has written that "[t]he failure of the U.S. nuclear power program ranks as the largest managerial disaster in business history," and counted 28 plants cancelled between 1978 and 1985 after construction had begun. James Cook, "Nuclear Follies," *Forbes* 1, 82 (Feb. 1985).

Having said all this, petitioners recognize that the decision below concerns matters of some complexity and that the opinions of the court of appeals and of FERC are quite lengthy. The question presented here, however, is straightforward and, more important, fundamental to the proper allocation of State and federal jurisdiction under the Federal Power Act. The underlying issues have been considered by this Court in related contexts. As we discuss, the court of appeals has rendered an interpretation of the Act at odds with those decisions of the Court and, in the process, has misconstrued the Court's recent decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986).

A.

Electric power is a staple ingredient of modern industry and society. Because electric utilities are natural monopolies and because electric power is "a product used in virtually every commercial and manufacturing facility," *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982), no State can effectively promote industrial development, protect its citizens from excessive power costs, and plan for the future unless it can closely regulate those utilities.

States accomplish these ends by requiring utilities to obtain prior approval before constructing a generation facility and by determining whether the utility has been prudent in constructing the plant, in purchasing power at wholesale and in incurring other expenses. Some states also review in advance utilities' power-purchase and other operating plans.[12] As the Court observed, this "regulation of utilities is one of the most important of the functions traditionally associated with the police power of the

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[12] *See* American Bar Ass'n, *The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities* (June 1981) (surveying state regulation of electric utilities).

States." *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

Part II of the Federal Power Act (16 U.S.C. §§ 824-824k) therefore established a *dual* system of State and federal jurisdiction in which the States are to have the preeminent role, to be "supplemented" by federal regulation of rates for the interstate transmission and the sale of power at wholesale.[13] The Act was "'conceived entirely as a supplement to, and not as a substitute for, State regulation.'" *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 525 (1945). Section 201(a) firmly declares that "Federal regulation [is] to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

Congress implemented this principle in the only way possible—by carefully confining federal regulatory jurisdiction. Under Section 201(b)(1) of the Act, 16 U.S.C. § 824(b)(1), FERC's authority is limited to exercising jurisdiction over facilities for "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . .." Within Section 201(b)(1)'s grant of jurisdiction there are two important restrictions.

As to the first, Congress made its intention clear by adding to Section 201(b)(1) the following language: "The

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[13] It is familiar history that Part II of the Federal Power Act was:

> a "direct result" of this Court's holding in Public Utilities Commission v. Attleboro Steam & Electric Co., [273 U.S. 83 (1927)], that the states lacked power to regulate the rates governing interstate sales of electricity for resale. . . . Part II of the Act was intended to "fill the gap" created by Attleboro by establishing exclusive federal jurisdiction over such sales.

New England Power Co. v. *New Hampshire*, 455 U.S. 331, 340 (1982). Congress intended that the legislation "tak[e] no authority from State commissions." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

Commission . . . shall not have jurisdiction . . . over facilities used for the *generation of electric energy* or over facilities used in local distribution," except as "specifically provided" elsewhere in the Act. As this Court has recognized, Congress was here "trying to reconcile the claims of Federal and of local authorities and to apportion Federal and state jurisdiction over the industry." *Connecticut Light & Power, supra*, 324 U.S. at 531. By enacting this "generation facility" restriction, Congress expressly rejected the Senate's original view that federal jurisdiction over generation facilities was needed "to secure the planned coordination of this industry on a regional scale." S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935).

The term "sale" in Section 201(b)(1) is a further restriction on federal authority, representing an important aspect of the Act's division of jurisdiction between State and federal regulators. FERC has jurisdiction to regulate only "sales of power at wholesale and not purchases."[14] FERC therefore cannot force utilities to purchase power. As we have discussed, that has been a matter for the States to control. Indeed, as recently as *Nantahala Power & Light Co.* v. *Thornburg*, 106 S. Ct. 2349, 2360 (1986), this Court assumed, although without deciding, that regulating "the particular *quantity* of power procured by a utility from a particular source"—in other words, regulating the "purchase"—was a matter for State agencies.

In this case, far from engaging in any such assumption, the court of appeals rejected it. In the court's view, the

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[14] *Wisconsin Michigan Power Co.*, 31 F.P.C. 1445, 1451 (1964). *See also*, with respect to FERC's lack of power to force purchases, *Otter Tail Power Co.* v. *Federal Power Commission*, 473 F.2d 1253, 1258 (8th Cir. 1973) (citing the "statutory prohibition against the forced enlargement of generating facilities"); *Southern Company Services, Inc.*, 20 FERC (CCH) ¶61,332, at 61,694 (1982).

federal agency, not the States, had exclusive jurisdiction to determine whether and to what extent AP&L (and the other MSU operating companies) must purchase Grand Gulf power. Under the terms of UPSA, AP&L was not a purchaser of Grand Gulf power; the only purchasers set forth in the agreement were LP&L, MP&L and NOPSI.[15] Under the terms of FERC's order, however, AP&L too was forced to become such a purchaser (App. 216a), and the court sustained FERC's authority, on the basis of what it described as "solid" case law (App. 45a), to adjust the percentages among the four companies accordingly.

With respect to the "generation facility" restriction, the court of appeals acknowledged that FERC's reallocation of the costs of Grand Gulf "does, to some extent, result in the 'regulation of matters relating to generation'" (App. 40a). The court thought, however, that FERC had not exceeded its jurisdiction because the Section 201(b)(1) "but" clause allows FERC to regulate generation facilities when another provision of the Act "specifically" so provides (App. 41a).

Petitioners submit that the court erred in its failure to enforce both of these restrictions on federal regulation.

B.

1. In refusing to confine FERC's jurisdiction in light of the forced purchase and generation facilities restrictions in the Act, the court of appeals relied on Section 206, which provides that if FERC, after a hearing, determines that:

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[15] These three purchasers expressed their entitlements to Grand Gulf power as percentages because, at the time UPSA was signed, they did not know how many megawatts of capacity from Grand Gulf would eventually become available (App. 383a-384a).

> any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. 16 U.S.C. 824e(a).

The court concluded that UPSA was a "contract affecting" a "transmission or sale subject to the jurisdiction of the Commission" within the meaning of Section 206. Its reasoning was simple and consisted of four propositions. First, UPSA distributed Grand Gulf capacity "among the MSU operating companies" (App. 34a), and thereby allocated capacity costs of Grand Gulf among those utilities. Second, "[c]apacity costs are a large component of wholesale rates" (App. 35a). Third, UPSA thus "plainly" affects the wholesale rates "at which the operating companies exchange energy" (*id.*).[16] Fourth, having detected purportedly unreasonable "disparities" in capacity costs among those companies, the Commission therefore had jurisdiction to "require remedial action" pursuant to Section 206 (*id.*).[17]

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[16] UPSA, in fact, did not determine the rates for wholesale power transactions between AP&L, MP&L, LP&L, and NOPSI, but rather determined only the share of Grand Gulf's capacity and costs to be allocated to the operating companies purchasing from MSE.

[17] In this case, FERC adopted the novel doctrine that it is "discriminatory," within the meaning of Section 206 of the Federal Power Act, for one electric utility to have different generation costs from other (affiliated or unaffiliated) utilities participating in a power-pooling arrangement. In the past, the Federal Power Commission rejected the proposition that it should equalize generation costs among affiliated operating companies, reasoning that such equalization would improperly entail subsidization of one utility's ratepayers by the ratepayers of other utilities. *Georgia Power Co.*, 52 F.P.C. 1343, 1350 (1974).

However, UPSA did *not*, as the court stated at the outset, distribute Grand Gulf capacity "among the MSU companies." Indeed, the fact UPSA did not do this was the basis of FERC's objections: AP&L was to take none of Grand Gulf's capacity and energy; there were three purchasers but AP&L was not one of them. In the language of Section 201(b), quoted above, there was no "sale of [Grand Gulf] electric energy at wholesale in interstate commerce" to AP&L. Capacity costs may well be a large component of wholesale rates, as the court next stated, but the capacity costs of Grand Gulf were not a component of AP&L's wholesale rates until FERC ordered them to become such.

The court below also erred in construing FERC's remedial authority under Section 206. A contract may be found to affect wholesale rates, but it does not necessarily follow, as the court of appeals believed, that FERC has plenary jurisdiction to reject that contract and replace it with what FERC believes would be just and reasonable. This Court so held in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).

Conway determined that even if "a rule, regulation, practice, or contract" within the meaning of Section 206 was one "affecting" a wholesale rate, it *did not* follow that FERC had jurisdiction to revise such "rule, regulation, practice, or contract." That is, under Section 206 the "rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context." 426 U.S. at 281. FERC has authority to consider such practices and contracts; *Conway* so held. But FERC must not cross over its jurisdictional boundary in order to regulate the contract or practice. FERC cannot, in short, impose a remedy that "invade[s] a nonjurisdictional area." 426 U.S. at 279. That is the meaning of Section 206 and it is a meaning at odds with the view of the court of appeals

in this case, which sustained FERC's jurisdiction to force AP&L to become a purchaser of Grand Gulf power.[18]

To adopt the logic of the court of appeals is, as *Conway* recognized, to ignore the Federal Power Act's purpose to confine federal jurisdiction and thereby ensure that traditional State authority is not ousted. It is difficult to conceive of any contract entered into by any one or a group of operating companies, among themselves or with others, that would not "affect" wholesale rates under the lower court's interpretation of Section 206. The contracts involved in building a power plant surely fit that description, yet no one would suppose that FERC therefore had jurisdiction to become a construction supervisor, or more to the point, to revise such contracts.

Until this case, there also would have been no doubt that AP&L's decisions whether to become an owner or to pay for some or all of the cost of a power plant constructed in Arkansas or outside the State were not matters under FERC's jurisdiction or control. Not very long ago, this Court was confident that the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205 (1983). And as we have indicated above, this Court assumed in *Nantahala* that the quantity of power purchased by a utility from a particular source was for the State to regulate.

The court of appeals misconstrued *Nantahala* when it sought to support its ruling by invoking that decision. *Nantahala* decided only that a State regulatory body

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[18] As we discuss below, the States are capable of effectively regulating the allocation of the capacity of a generating plant intended to supply power to utilities in several States. *See* p. 27, infra.

setting retail rates may not engage in a collateral attack on a FERC decision that had set wholesale rates. The case did not present the question whether FERC had kept within the bounds set in the Federal Power Act when it rejected an apportionment of low-cost power between Nantahala and an affiliated utility and required Nantahala to file revised rates. *Nantahala* reached this Court on appeal from a State court, which had upheld a State commission's ruling that required an apportionment different from that demanded by FERC's earlier order. Relying on the filed-rate doctrine,[19] the Court held that the State regulators had to track in their rate calculations the FERC adjustments to the Nantahala-Tapoco-TVA coordination and apportionment agreements. The validity of FERC's remedy, however, was not before the Court, as the Court made clear at the outset of its opinion.[20]

In the context of judicial review of a FERC order, *Nantahala* does not represent a "clear and timely message that FERC's jurisdiction" to reallocate Grand Gulf capacity under Section 206 is "unquestionable," as the court of appeals believed (App. 38a). The message of *Nantahala* is that challenges to FERC orders setting wholesale rates cannot be made in State regulatory commissions, but must be made directly in the federal

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[19] The filed-rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.

Nantahala, 106 S. Ct. at 2359.

[20] *See* 106 S. Ct. at 2353 ("FERC's decision has a direct bearing on this case, but the decision before us is an opinion of the North Carolina Supreme Court that affirmed a [Utilities Commission of North Carolina] order.").

courts of appeals and, ultimately, this Court, which is why this petition has been filed.[21]

2. As we have discussed, Section 201(b)(1) of the Federal Power Act denies FERC jurisdiction "over facilities used for the generation of electric energy," and instead leaves to each State jurisdiction over the manner in which utilities serving the State will satisfy their power needs through generation facilities. FERC's order emasculated the Arkansas PSC's control over AP&L's generation facilities. The construction and prudency of the Grand Gulf plant were never reviewed by the Arkansas PSC and the facility was not needed to satisfy AP&L's load. By foisting a sizeable share of the Grand Gulf generation plant on AP&L through cost "equalization," AP&L must necessarily share with utilities in other states the advantages of the economical power from its own Arkansas plants, even though the Arkansas PSC certificated the construction of those plants in order to meet Arkansas' needs (App. 106a).

Although, as we have indicated, the court of appeals acknowledged that FERC's allocation of Grand Gulf's

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[21] At all events, the Court in *Nantahala* did not even refer to Section 206. The generation facility restriction was not at issue and no question of forced purchase was involved because in that case FERC did not compel any utility to increase the total amount of energy or capacity purchased, a matter the Court assumed was within the authority of the State. Indeed, in discussing its own decision in that case, FERC concluded that "*Nantahala* is not directly on point" (App. 169a) and that the "facts of *Nantahala* are clearly distinguishable from those here" (App. 125a). Moreover, in an August 1987 rulemaking proceeding involving regulation of natural gas pipelines, FERC acknowledged that the Court's *Nantahala* decision does not preclude state regulators from reviewing the prudency of natural gas purchasing decisions made by local distribution companies, whose rates are exclusively set by the states. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 52 Fed. Reg. 30,334, 30,344 (Aug. 14, 1987) (interim rule and statement of policy).

capacity does regulate generation, the court stressed that the "generation facility" restriction contains a proviso stating: "except as specifically provided" in other sections of the Act (App. 39a-40a). Therefore, the court held that the generation facility restriction does not apply "where generation facilities are used for interstate wholesale sales" (App. 41a.)

This reading of the Act is not viable on its face. Because Section 201(b)(1) provides that FERC's jurisdiction shall not extend to any sale of energy other than an interstate sale at wholesale,[22] the "generation facility" exception would be entirely superfluous if it did not apply to facilities that produce power sold in interstate commerce at wholesale. As we have also discussed, *Conway* holds that FERC may not, under Section 206, devise a remedy that invades a nonjurisdictional area. Moreover, the "exceptions" to the "generation facility" restriction actually stated in the Act have nothing to do with this case.[23]

This Court has previously rejected an attempt, based on the same reasoning used by the court below, to circumvent the specific restrictions on FERC's jurisdiction contained in Section 201(b)(1). In *Connecticut Light & Power, supra*, the Court barred the Federal Power Commission

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[22] Section 201(b)(1) states, in pertinent part, that

"[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . *but . . . shall not apply to any other sale of electric energy . . .*." 16 U.S.C. § 824(b)(1) (emphasis added).

[23] The provisions of the Federal Power Act giving FERC limited jurisdiction over generation facilities include: § 202(a), concerning the division of the United States into districts for the voluntary coordination of facilities (16 U.S.C. § 824a(a)); and § 202(c), concerning the authority to order temporary connection of facilities and such generation, delivery, interchange or transmission necessary to meet emergencies (16 U.S.C. § 824a(c)).

(FERC's predecessor) from exercising jurisdiction over a "local distribution facility" carrying out-of-state energy, holding that Section 201(b)(1)'s express limitation on federal jurisdiction over such facilities (which immediately follows the "generation facility" exception) applies even when such facilities "carry no energy except extra-state energy." 324 U.S. at 531. Any other result, the Court stated, "would nullify the exemption and as a practical matter would transfer to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control."[24] *Id.*

Connecticut Light & Power fully applies here. FERC cannot ignore the constraints on its jurisdiction over "generation facilities" simply because a facility's output is transmitted or sold in interstate commerce. Such a step conflicts with the manner chosen by Congress "to apportion Federal and state jurisdiction over the industry."[25] 324 U.S. at 531.

3. The court of appeals thought that the Federal Power Act's restrictions on FERC's jurisdiction did not apply in this case because Grand Gulf had been "built and planned on a profoundly integrated basis" and had been intended to serve several states (App. 33a). The court was mistaken.

The Federal Power Act cannot be approached like the Commerce Clause of the Constitution, with a court con-

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[24] With respect to the possible effect on interstate commerce of its ruling, the Court in *Connecticut Light & Power* explained that Congress "sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed" and that it had done so in the Federal Power Act. 324 U.S. at 530.

[25] The only support cited by the court of appeals for its contrary position is a footnote in *Connecticut Light & Power* that described a holding in a lower court decision. 324 U.S. at 528 n.6 (App. 43a).

struing federal authority to apply broadly to all matters affecting interstate commerce, leaving only what remains to exclusive State control. Congress took the opposite approach. Thus, in restricting FERC jurisdiction over generation facilities, Congress rejected the view that federal jurisdiction over such facilities was needed "to secure the planned coordination of this industry on a regional scale." S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). Similarly, Congress deliberately withheld from FERC plenary jurisdiction to require the interconnection of electric utilities serving several States, but rather adopted a policy, stated in Section 202(a) of the Act, 16 U.S.C. § 824a(a), of encouraging *voluntary* interconnection on a regional basis.

By limiting FERC's power over "integrated" utilities operating on a regional basis, Congress sought to respect the States' substantial interest in controlling the generation and wholesale power purchases of such utilities, which today account for more than half of the nation's generating capacity. *See* note 10, *supra*. While the activities of "integrated" utilities that operate across a multi-state region may affect federal interests in various ways, the Court has made clear that federal regulatory authority is bounded even in such cases by Congress' determination that State authority over particular matters of vital State concern is best accommodated rather than preempted. The Court firmly stated that principle in *Connecticut Light & Power* more than forty years ago (*see* p. 22, *supra*), and recently applied it again in *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986). Construing the Communications Act of 1934 in *Louisiana PSC*, the Court held that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."[26]

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[26] In *Louisiana PSC*, the Court considered an attempt by the Federal Communications Commission ("FCC") to preempt State

106 S. Ct. at 1901.

When Congress did specifically address the subject of "integrated" utilities under common control—in the Public Utility Holding Company Act of 1935 ("PUHCA")—it sought to preserve effective State regulation of the utilities' retail rates, not radically to diminish it as FERC has sought to do here.[27] Thus, the courts have recognized that "[t]he purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation—not to supplant it." *Alabama Electric Cooperative, Inc.* v. *SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966).[28]

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authority over depreciation rates for intrastate telephone service on the grounds that state-prescribed depreciation rates might interfere with the smooth operation of the FCC-regulated interstate communications network. The Court struck down the FCC's action, noting that the Communications Act of 1934 established a dual system of federal and State regulation that specifically "fences off from FCC reach or regulation intrastate matters." 106 S. Ct. at 1899. In the face of this statutory limitation on FCC jurisdiction, the Court held that it "simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy." 106 S. Ct. at 1901.

[27] Congress enacted PUHCA, 15 U.S.C. §§ 79 *et seq.*, as part of the same legislation containing Part II of the Federal Power Act. *See* 49 Stat. 803 (1935). PUHCA increased the jurisdiction of the Securities and Exchange Commission ("SEC") over public utility securities, and authorized the SEC to require the simplification of the structure of public-utility holding-company systems so that their retail rates could be regulated effectively by the various states. As one leading commentator explains, PUHCA's "fundamental purpose was to free operating companies from absentee landlordism so as to facilitate state regulation." L. Loss, *Securities Regulation* 157 (1961).

[28] One of the primary tasks of the SEC under PUHCA is the limitation of the operations of a holding company to that of a single integrated public utility system, 15 U.S.C. § 79k(b)(1), which system is "not so large . . . as to impair the advantages of *localized* management, efficient operations, or the effectiveness of regulation." 15

The court of appeals mistakenly thought that *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952), provided a "solid foundation" for FERC's authority to order a purchase of power when such an order "is consistent with the historical integration of a power pool or network" (App. 45a). The Court there held that a rate-reduction order of the Federal Power Commission could not be collaterally attacked on the basis that the rates were originally established through a contract later determined to violate the antitrust laws. 343 U.S. at 423-24.

Neither the "forced purchase" restriction nor the "generation facility" restriction was even discussed by the Commission or the Court in *Pennsylvania Water*, and for good reason. In that case, the Commission had set wholesale rates in an earlier order on the basis of voluntary contractual arrangements between a Pennsylvania utility and a Maryland utility. When the Pennsylvania utility unilaterally sought to terminate those arrangements, the Commission merely required it to continue receiving and selling power, pursuant to the *existing* Commission rate-schedule, until such time as the Pennsylvania utility properly filed a proposed change to the rate-schedule.[29] The

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U.S.C. § 79b(a)(29)(A) (emphasis added). The legislative history explains Congress' view that an operating system "whose management is confined . . . to . . . the service of one regional community is likely to . . . be amenable to local regulation . . . and more often to get along with the public to mutual advantage." S. Rep. No. 621, 74th Cong., 1st Sess. 12 (1935).

[29] Once the Commission's earlier order had gone into effect, it was the order —not the contract —that controlled and the Court so held. 343 U.S. at 422. When the Pennsylvania utility sought to terminate the contracts by "*ex parte* action" it thus sought to invalidate the Commission's order which (like its own contracts) had required it to buy, sell and transmit power. 343 U.S. at 421. *See In re Pennsylvania Water & Power Co.*, 8 F.P.C. 170, 177 (1949), *aff'd*, *Pennsylvania Water & Power Co.* v. *Pennsylvania Public Utilities Comm'n*, 193

Commission did not impose an entirely new capacity-purchase obligation on a utility, as FERC has sought to do here. In short, *Pennsylvania Water* represents at most a decision upholding the jurisdiction of the Federal Power Commission to require compliance with its outstanding orders.[30]

Finally, the continuation of the States' longstanding regulatory control over the quantity of wholesale purchases made by a utility within the State from out-of-state affiliates is entirely workable, and need not lead—as the court below feared—to irreconcilable, "parochial" actions by the various States (App. 51a-53a). Section 209 of the Federal Power Act specifies procedures by which FERC and State commissions can coordinate and jointly address problems relating to their respective jurisdictions. 16 U.S.C. § 824h. In addition, each State is fully able to require that any utility serving the State secure its formal approval before contracting to purchase any particular quantity of wholesale power from an out-of-state generation facility.[31] Any subsequent attempt by a State to void

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F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952). The Commission decided, and the Court agreed, that the Pennsylvania utility could later terminate these practices *only* by filing under Section 205 of the Federal Power Act, 16 U.S.C. § 824d, and that the Commission had authority under Section 206 to require that the practices required in its order continue until such filing. 343 U.S. at 422.

[30] *Pennsylvania Water* thus cannot be relied upon, as the court of appeals thought, for the proposition that FERC has jurisdiction to force a utility to purchase power when —as here —it had not voluntarily contracted to do so and when FERC had not already issued an order incorporating all or part of the practices embodied in such a contract.

[31] In fact, the Arkansas PSC has determined that AP&L failed to obtain necessary regulatory approvals before entering into agreements with MSE and others relating to the allocation of Grand Gulf capacity and energy. *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 408-09, 412-13 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986).

that quantity-purchase obligation could then be challenged as an unconstitutional "taking" prohibited by the Due Process Clause. No infringement of FERC's paramount authority to set wholesale *rates* for interstate transactions would arise, and each State would simply have the right to regulate the *quantity* or choice of wholesale power to be purchased by the utility serving that State at the FERC-approved rate.[32]

C.

This case has already produced a clash of federal and State authority respecting each of the four MSU operating companies affected by FERC's "reallocation" of Grand Gulf capacity. The Court now has before it an appeal from a decision of the Mississippi Supreme Court denying MP&L an increase in its retail rates, in an amount corresponding to FERC's "reallocation" of Grand Gulf costs to MP&L, until the Mississippi Public Service Commission determines the "prudence" of the cost obligations incurred by MP&L. *Mississippi Power & Light Co. v. State of Mississippi*, No. 86-1970.[33]

If we are correct that FERC exceeded its jurisdiction in "reallocating" Grand Gulf capacity to AP&L, the

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[32] *See, e.g., Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 498 A.2d 696 (1985); *Pike County Light & Power Co.* v. *Pennsylvania Public Utilities Comm'n*, 465 A.2d 735 (Pa. Cmwlth. 1983).

[33] In addition to the Mississippi state proceedings involved in *Mississippi Power & Light Co.*, concerning MP&L, the right of each of the other MSU operating companies to pass through its share of the FERC-allocated Grand Gulf costs has been challenged in state proceedings. *See Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n, supra* (AP&L); *New Orleans Public Service, Inc.* v. *City of New Orleans*, 782 F.2d 1236 (5th Cir. 1986), *later op.*, 798 F.2d 858, *cert. denied*, 107 S. Ct. 1910 (1987) (NOPSI); *Louisiana Power & Light Co.* v. *Louisiana Public Service Comm'n*, No. 292,026 (19th Jud. Dist., Parish of East Baton Rouge, La., Oct. 9, 1985) (LP&L).

Court's review of *Mississippi Power & Light* is likely to be substantially affected. We therefore suggest that the Court may wish to consider reviewing this case in tandem with *Mississippi Power & Light* in order to ensure that the full range of relevant jurisdictional issues is addressed.[34]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 1987

[34] Although FERC has not yet acted on remand to explain or alter its allocation of Grand Gulf capacity among AP&L and the other MSU operating companies, the court of appeals' decision on rehearing — which held that FERC had not adequately explained why AP&L continued to have the lowest cost nuclear power (App. 94a) —leaves no doubt that AP&L will ultimately be saddled by FERC and the court of appeals with a 36 percent or greater share of Grand Gulf's cost. There is no reason for the Court to await the outcome of the further proceedings below to determine whether FERC has jurisdiction in the first place to force AP&L to purchase Grand Gulf capacity, especially since the jurisdictional issues discussed above present far more profound legal issues than the precise "allocation" to be finally settled upon by FERC and the court of appeals.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

Filed Jan 6 1987

MISSISSIPPI INDUSTRIES,

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

MISSOURI PUBLIC SERVICE COMMISSION, MISSISSIPPI POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COMPANY, ET AL., CITY OF NEW ORLEANS, LOUISIANA, MISSISSIPPI PUBLIC SERVICE COMMISSION, STATE OF ARKANSAS, UNION CARBIDE CORPORATION, OCCIDENTAL CHEMICAL CORPORATION, ARKANSAS & MISSOURI CONGRESSIONAL DELEGATIONS, LOUISIANA PUBLIC SERVICE COMMISSION, ARKANSAS PUBLIC SERVICE COMMISSION, JEFFERSON PARISH, LOUISIANA, ARKANSAS POWER & LIGHT COMPANY, MIDDLE SOUTH ENERGY, INC., MIDDLE SOUTH SERVICES, INC., AND CITIES OF CONWAY AND WEST MEMPHIS, ARKANSAS,

Intervenors

No. 85-1613, 85-1620 & 85-1621

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMMISSION,
Respondent

No. 85-1615

ARKANSAS POWER & LIGHT COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1616

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1617

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1618

OCCIDENTAL CHEMICAL CORPORATION, ET AL.,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1619

REYNOLDS METALS COMPANY, ET AL.,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1623

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1624

ARKANSAS AND MISSOURI CONGRESSIONAL DELEGATIONS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1626

ARKANSAS PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1637

STATE OF ARKANSAS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1640

MISSISSIPPI LEGAL SERVICES COALITION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1647

CITY OF NEW ORLEANS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1712

MISSOURI PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1719

REPRESENTATIVE WEBB FRANKLIN,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1772

JEFFERSON PARISH, LOUISIANA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: Edwards And Bork, Circuit Judges, And Wright, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Federal Energy Regulatory Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Energy Regulatory Commission under review herein are hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/George A. Fisher
Clerk

Date: January 6, 1987
Opinion Per Curiam.
Separate opinion by Circuit Judge BORK, concurring in part and dissenting in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

Filed Apr 3 1987

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Edwards and Bork, Circuit Judges; Wright, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing of the City of New Orleans, Louisiana, the petition of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and of the petition of Mississippi Power and Light Company, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

Filed Apr 3 1987

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of the City of New Orleans, Louisiana, the suggestion of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and the suggestion of Mississippi Power and Light Company were circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular

active service voted in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that these cases will be reheard by the Court sitting *en banc*, such rehearing to be limited to the issues raised by the dissenting opinion of January 6, 1987. It is

FURTHER ORDERED, by the Court *en banc*, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address the two issues raised in the dissenting opinion, specifically, pages 76 to the end of the first paragraph on page 80, and the judgment of the same date insofar as it concerns those issues, are hereby vacated. It is

FURTHER ORDERED, by the Court *en banc*, that briefs limited to the issues identified in the dissenting opinion of January 6, 1987 shall be filed in accord with the following schedule:

Petitioners' brief (limited to 15 pages) ..... May 29, 1987

Brief of respondent (limited to 25 pages) and briefs of supporting intervenors, if any (limited to 10 pages) ..... July 30, 1987

The parties shall submit 30 copies of each brief filed. In light of the length of the briefing schedule, parties on the same side are expected to circulate drafts of their briefs and to file a joint brief, or briefs, or adopt briefs of other parties, wherever possible. The court looks with extreme disfavor upon numerous briefs presenting repetitive arguments.

The parties are further directed to submit 30 additional copies of all briefs previously filed and 15 copies of the joint appendix by May 29, 1987.

The parties will be advised by future order of the date of argument before the *en banc* court. That date will be sometime after commencement of the court's 1987 term, on September 8, 1987.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

ORDER #1
June 24, 1987

MISSISSIPPI INDUSTRIES
v.
FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges

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Filed Jun 24 1987

ORDER

Upon reconsideration of the suggestion for rehearing *en banc* of the City of New Orleans, Louisiana, the sug-

gestion of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and of the suggestion of Mississippi Power and Light Company, it is

ORDERED, by the Court *en banc*, on its own motion, that the suggestions are denied. It is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that the Court's order of April 3, 1987, setting these cases for rehearing by the Court *en banc* is hereby vacated. It is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address the two issues raised in the dissenting opinion, specifically, pages 76 to the end of the first paragraph on page 80, and the judgment of the same date insofar as it concerns those issues, are hereby reinstated.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

ORDER #2
June 24, 1987

MISSISSIPPI INDUSTRIES
v.
FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Edwards And Bork, Circuit Judges; Wright, Senior Circuit Judge

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Filed Jun 24 1987

ORDER

Upon reconsideration of the petition for rehearing of the City of New Orleans, Louisiana, the petition of Mississippi Industries, the Mississippi Attorney General and

the Mississippi Public Service Commission, and of the petition of Mississippi Power and Light Company, it is

ORDERED, by the Court, on its own motion, that the order of April 3, 1987, denying rehearing by the panel is hereby vacated. It is

FURTHER ORDERED, by the Court, on its own motion, that the petitions are granted. It is

FURTHER ORDERED, by the Court, on its own motion, that, for the reasons stated in the dissenting opinion of January 6, 1987, the Commission's decision is reversed and this case is remanded for reconsideration of the decision to equalize the capacity costs of all nuclear plants, and for an explanation of the criteria used to determine what constitutes "undue discrimination" and of why the Commission's ultimate decision is not unduly discriminatory. It is

FURTHER ORDERED by the Court, on its own motion, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address these two issues, specifically, pages 76 to the end of the first paragraph on page 80 and the judgment of the same date insofar as it concerns those issues, are hereby vacated.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ELECTRIC RATES: Remand

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

Docket No. ER82-616-032

System Energy Resources, Inc. (formerly, Middle South Energy, Inc.)

Docket No. ER82-483-028

MSU System Services, Inc. (formerly, Middle South Services, Inc.)

ORDER INVITING SUBMISSION OF COMMENTS AND GIVING NOTICE AS TO RATES IN EFFECT

(Issued July 24, 1987)

On June 24, 1987, the United States Court of Appeals for the District of Columbia Circuit, *inter alia:* (1) reversed the Commission's decision in *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶61,305, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶61,425 (1985); and (2) remanded the case for (a) reconsideration of the decision to equalize the capacity costs of all nuclear plants on the Middle South system and (b) an explanation as to the criteria used to determine "undue discrimination" and why the allocation chosen by the Commission is not unduly discriminatory. *Mississippi Industries, Inc.* v. *FERC*, Nos. 85-1611, *et al.* Subsequently, the court issued an order permitting the Commission to continue the present allocation for 30 days from the issuance of the

mandate but subject to refunds, if appropriate, from the date the mandate issues.[1]

Pleadings have been filed, *sua sponte*, by several parties as to the action they believe the Commission should take in light of the remand. The Commission believes that all parties to this case should be afforded an opportunity to submit their views on this issue. We shall therefore permit any party to this case to file, within twenty (20) days of the date of this order, initial comments as to what action the Commission should take in light of the matters remanded by the court. Responsive comments, if any, shall be due within ten (10) days thereafter.

The rates currently on file reflect the allocation ordered by the Commission in Opinion No. 234. No other rates being on file or in effect, the rates filed in compliance with Opinion No. 234 remain in effect. *Arkansas Louisiana Gas Co.* v. *Hall*, 452 U.S. 571 (1981); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *see also Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 141 (1982) ("federal court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves").

The Commission orders:

Within twenty (20) days of the date of this order, any party to this case may file initial comments as to what action the Commission should take in light of the matters remanded by the court in *Mississippi Industries, Inc.* v.

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[1] The court's mandate issued on July 1, 1987.

FERC, Nos. 85-1611, *et al.* Responsive comments shall be due within ten (10) days thereafter.

By the Commission.

(SEAL)

/s/Kenneth F. Plumb,
Kenneth F. Plumb
Secretary.